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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 593

FRED BERNARD DeGILLIO and
MILTON SILVERMAN,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Fred Bernard DeGillio and Milton Silverman, pray that a Writ of Certiorari issue to review the order of the Supreme Court of Michigan entered on the 8th day of August, 1961, denying the petitioners leave to appeal from a judgment of conviction entered in the Circuit Court for the County of Genesee, Michigan, wherein the petitioners, Fred Bernard DeGillio and Milton Silverman were sentenced to Jackson Prison, and to review the Order of the Supreme

Court of the State of Michigan dated the 21st day of September, 1961 affirming the Order of August 8, 1961, which denied petitioners Leave To Appeal from said conviction.

JURISDICTION

Jurisdiction of this Court is invoked because the Orders of the Supreme Court of the State of Michigan denying petitioners Leave to review their conviction, deprived petitioners of their Constitutional protection of Due Process under the Fourteenth Amendment of the Federal Constitution, and deprived them of their Constitutional Guarantee of Counsel under the Sixth Amendment of the United States Constitution.

QUESTION PRESENTED

Involved herein are the questions:

A. Of the Constitutional right of petitioners to counsel when statements were taken from them at the time of their arrest.

B. Their Constitutional right to counsel at the preliminary examination.

C. Whether they were denied their Constitutional right to Due Process with the introduction in evidence, argument thereon by the prosecutor, and the submission to the jury for their consideration, over objections, written statements of the prosecutor that he thought the defendants were guilty of the crime charged, and also written statements of their refusal to answer questions without counsel.

D. Whether Petitioners were denied their Constitutional right to Due Process, being convicted on an information which charges no crime.

SUMMARY STATEMENT OF MATTERS INVOLVED

In June, 1960 Mark and Gabrieline Lavrack desired to sell their equity in real estate known as 6159 Penwood, Mt. Morris, Michigan, and which was subject to a mortgage balance of $13,878.73. They offered their equity in the property for $500.00. Petitioner DeGillio agreed to buy the equity for that amount and through Lavracks' real estate agent paid the $500.00 to the Lavracks.

In January, 1961, petitioners Fred B. DeGillio and Milton Silverman were arrested on a Criminal Warrant which charged them in Count I, of obtaining by false representations real estate from the Lavracks, and in Count II of conspiring by false pretenses to acquire the real estate from the Lavracks (Appendix 1a-3a).

Upon their apprehension under the Warrant, the Prosecuting Attorney on the 18th day of January, 1961, undertook to question petitioner Milton Silverman and stenographically recorded the questions and answers. Petitioner Silverman refused to answer any questions, insisting that he wanted a lawyer. None was allowed him. The prosecutor also suggested, by innuendo, that the petitioner Silverman was on Federal probation (Appendix 5a). Silverman never testified.

Upon the arrest of petitioner Fred Bernard DeGillio, on January 18, 1961, the prosecutor undertook the questioning of the petitioner DeGillio and had the same recorded stenographically. DeGillio insisted upon an attorney. None was allowed him. The prosecutor suggested, in

the written statement, that he thought DeGillio was a criminal and that was why he issued the warrant (Appendix 9a).

Thereafter the petitioners were arraigned before a magistrate and pursuant to adjournment, examination on the Warrant was set for February 15, 1961.

In Court on February 15, 1961, before the Examining Magistrate, the petitioners advised the Court that their counsel was engaged in the trial of a case in the United States District Court, and that they desired a continuance since they had no counsel. Continuance was denied them. The Magistrate proceeded to hearing with the statement, "Counsel or no counsel, as far as I am concerned the case will proceed as scheduled," and bound the petitioners over to the Circuit Court for the County of Genessee for trial (Appendix 13a-14a).

An Information was subsequently filed against the petitioners in the Circuit Court for the County of Genesee embodying the complaint as contained in the warrant, charging the petitioners with two counts, (1) of obtaining property by false pretenses and (2) conspiracy to cheat and defraud (Appendix 15a-16a).

Motion to Quash the Information was filed on behalf of the petitioners, in which it was asserted that at said alleged preliminary examination the petitioners' Constitutional rights were violated in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution. This Motion was, on the 9th day of March, 1961, denied by the Trial Judge (Appendix 17a-23a).

Upon a jury being impaneled, the petitioners again objected to the proceedings on the ground that their Constitutional rights to counsel at the examination were violated and that, in fact, the examining magistrate lacked

jurisdiction to conduct the hearing. The objections were overruled.

Upon the trial, over objections, the written statements, *supra*, made and taken by the prosecutor, were submitted in evidence by him as Exhibits 3 and 4 (Appendix 24a-25a); were used as a basis for argument to the jury by the prosecutor and were given to the jury to take into their jury room. The prosecutor failed to submit proof in support of the false pretense count. The Court directed a verdict of not guilty on the count of obtaining property under false prefenses. After the Court had directed the jury to return a verdict of not guilty on the substantive count, the jury returned a verdict of Guilty As Charged, but upon re-instruction to return a verdict of Not Guilty on the substantive count, the jury then returned a verdict of Not Guilty on the substantive count but guilty on the conspiracy count (Appendix 26a).

On Motion for a new trial, the petitioners again urged that their Constitutional rights to counsel and of Due Process were denied them. On the 18th day of July, 1961, the Trial Judge overruled the Motion, sentenced the petitioner DeGillio to pay a fine of $7,500.00 within 48 hours, pay costs, within one week, of $900.00, spend 30 days in jail and 4 years probation; and on said day sentenced the petitioner Silverman to Jackson Prison for not less than 4½ nor more than 5 years (Appendix 29a-31a).

Thereafter, within the 30 day period while the petitioner DeGillio was in the County Jail, the Trial Judge revoked petitioner DeGillio's probation on the ground that he had not paid within 48 hours the $7,500.00 fine, and within one week the $900.00 costs, and sentenced petitioner DeGillio to Jackson Prison for not less than 2½ nor more than 5 years.

Petitioners sought Leave to Appeal to the Supreme Court of the State of Michigan. Their application therefor was denied by the Supreme Court of the State of Michigan on the 8th day of August, 1961, without opinion (Appendix 31a-32a) and on re-hearing the denial was affirmed on the 21st day of September, 1961, without opinion (Appendix 32a-33a). From this denial petitioners seek review by this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Michigan has without opinion refused to review the conviction of the petitioners who assert that their Constitutional right to counsel was denied them at the time of their arrest and when they were being interrogated by the prosecuting attorney, particularly when the statements are recorded stenographically and which statements contain assertions by the prosecuting attorney (a) that he thinks petitioner DeGillio is guilty of the crime charged, and (b) that he, the prosecutor, by innuendo, thinks that petitioner Silverman is on Federal probation, and then submits these statements to the jury for its consideration. We urge that at the moment of the petitioners' arrest and that upon their demand, they were entitled to the protection of their Federal Constitution which gives them the right to counsel.

In *Spano v. New York*, 360 U.S. 315, Mr. Justice Douglas aptly observes,

> "Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." and such a deprivation "after indictment and before trial" may indeed, be tantamount to the denial of "effective representation by

> counsel at the only stage when legal aid and advice would help him."

Spano was quoted with approval in *People v. Waterman*, 9 N.Y. 2d 561. The language of the Court of Appeals should be indelibly inscribed upon the minds of prosecuting officials,

> "This court condemned secret interrogation of a defendant by law enforcement authorities after indictment as violative of the defendant's constitutional rights."

and further,

> "Such questioning, we held, *impinged upon the defendant's twofold rights to the assistance of counsel and to freedom from testimonial compulsion*." (Italics ours.)

and again,

> "*The constitutional and statutory right of a defendant to the assistance of counsel at every stage of a criminal cause* is limited neither to capital cases nor to the situation where the defendant already has an attorney. *The constitutional guarantee includes a reasonable time to obtain counsel*." (Italics ours.)

and again,

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

It is significant to note that both petitioners insisted upon counsel, and it is significant to note that the state-

ments taken were subsequently submitted to the jury for their consideration.

2. The petitioners were denied their right to counsel at the preliminary examination in violation of their Constitutional rights under the Sixth Amendment.

> "A preliminary examination is essentially judicial, it has all the qualities of a judicial proceeding,"

holds *Woods v. The United States*, 128 Fed. 2d 265, and it further holds that an accused is entitled to have counsel at such preliminary hearing.

The statement of the examining magistrate, "*Counsel or no counsel, as far as I am concerned, the case will proceed as scheduled,*" was a flagrant violation of petitioners' rights. (Italics ours.)

If the preliminary examination is essentially a judicial proceeding *(Wood v. The United States, Supra)*, then the failure of the accused, on their demand to have the assistance of counsel, deprived the examining magistrate of jurisdiction and he was without power to bind the petitioners over for trial.

In *Johnson v. Zerbst*, 304 U.S. 1019, we find:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal Court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. *If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a*

> *valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel,* who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. *If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed.* The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.* A judge of the United States—to whom a petition for *habeas corpus* is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void'." (Italics ours.)

We urge that it is so at bar.

We call the Court's attention to *Moore v. The State of Michigan*, 78 Supreme Court Reporter, 191:

> "The right to counsel is not a right confined to representation during the trial on the merits. *Reece v. State of Georgia*, 305 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77."

And in *Re Elliott*, 315 Mich. 662, the Supreme Court stated:

> "The fundamental law of the State has long recognized the right of one charged with crime to have the assistance of legal counsel for his defense.
>
> "In every criminal prosecution, the accused shall have the right, * * * to have the assistance of counsel for his defense." Const. (1908), art. 2, P19.

We urge that the petitioners' right to counsel under the Constitution comes into play the moment of his arrest

under a criminal warrant and it continues until his sentencing. To deny him counsel at any stage of the criminal proceedings and at a preliminary examination is to deny him Due Process.

In *Lambus v. Kaiser*, 176 S.W. 2d 494, the Supreme Court of Missouri said:

> "The Sixth Amendment of the Federal Constitution and Section 22 of Article II of our Constiution both guarantee the accused the right of counsel 'in criminal prosecutions'. Under either of these provisions there can be no doubt but that an accused at a preliminary examination is entitled to be represented by counsel if he wishes and opportunity of counsel must not be denied him."

To the same effect, *People v. Napthaly* (Calif., 39 Pac. 29).

We urge that the examining magistrate lost jurisdiction to bind the petitioners over to the Circuit Court for trial when he denied them their Constitutional right to representation by counel at the preliminary hearing (*Johnson v. Zerbst, supra*).

3. Petitioners were denied Due Process in violation of the Fourteenth Amendment. Over the objections of petitioners, the Court received in evidence Exhibits 3 and 4. The prosecutor argued to the jury thereon, gave the jury the prosecutor's belief that DeGillio was guilty of the crime charged and that was why he was arrested; insinuated to the jury that petitioner Silverman was on Federal probation, without Silverman having testified. This was more than error. This was fundamental unfairness.

In *People v. Kolowich*, 262 Mich. on page 137, the Supreme Court of Michigan had this to say:

> "The zeal of the prosecutor in vigorously prosecuting the offenders, in line with his duties, is to be

> highly commended. However * * * it still remains his duty to see that the Constitutional right to a fair trial is afforded the accused. * * * An ink spot may be blotted out in part, but the stain still remains."

We suggest to this Court that the foregoing statement of the law was in a case involving the closing argument of a prosecuting attorney about another conviction in another case even though the Court instructed the jury to disregard it. At bar the Court in its instructions to the jury distinctly told the jury to take these statements into consideration in arriving at a verdict even though the Court had directed the jury to find the petitioners not guilty on the substantive count.

In line with this argument and in support of the contention that petitioners have been denied due process, we submit, *Hanford v. U.S.*, 249 F(2) 295; *Lisenba v. California*, 72 Supreme Court 289-290; *Berger v. United States*, 55 Supreme Court 629; *Baker v. Hudspath*, 129 Fed. 2d 779.

In *Steele v. The United States*, 222 Fed. 2d 628, we find,

> "It will suffice to say of the second specification of error that, though the argument of the U. S. Attorney was not objected to, it did go unadmonished and uncorrected so far out of bounds as to put the district judge in error in not, of his own motion, admonishing the Government's counsel to desist from that kind of argument and directing the jury that the argument was incorrect and unfair and that they should not consider it. This was especially so with respect to the U. S. Attorney's statements of his personal opinion that he believed defendant guilty about previous conviction."

and again in *U. S. v. Levi*, 177 F. (2) 827:

> "When the Assistant U. S. Attorney asked Levi if he were the same Levi who was convicted a few days previously in a tax evasion case, he knew or at least should have known that a judgment of conviction in that case had not been entered * * * Under such circumstances asking that question constituted error."

To the same effect, *U.S. v. Ragen*, 86 Fed. Supp. 382; *Commonwealth v. Burke*, (Mass.) 159 N. Eastern 2d 856.

A pertinent statement of the law is found in *People v. Biancalli*, by the Court of Appeals of New York reported in 9 N. Y. 2d 468:

> "On the trial, the People were allowed to show as part of their direct case that during the police interrogation, *immediately after arrest, the defendant either had refused to answer a series of incriminating questions or had remained mute as well as having insisted upon consulting counsel.* This showing was not confined to an isolated instance or an inadvertent improper question that under certain circumstances might well be overlooked as not affecting a substantial right of a defendant but, on the contrary, was part of a persistent repeated course of conduct which may not be overlooked. The defendants' numerous objections were overruled and their motions for a mistrial denied with variously worded rulings to the general effect that questions were not evidence and that whether or not anyone said anything under certain circumstances was something for the jury to consider.
>
> *Persistent and repeated introduction of evidence of this type, for whatever purpose, cannot help but have the effect of implanting in the minds of the jury the impression that defendants' refusals to answer were so inconsistent with innocence as to amount to admissions of guilt.*" (Italics ours.)

A reading of Exhibits 3 and 4 and the rulings of the trial judge thereon, clearly indicate that the petitioners' rights to a fair and impartial trial under the Constitutional Mandate of Due Process were flagrantly violated.

4. We suggest to the Court that the petitioners were found Not Guilty of the count charging them with obtaining property under false pretense. We urge to the Court that no crime is charged on the second count of conspiracy.

The Trial Court had this to say (Appendix 39a):

> "*In general, the Court will say it thought there was plenty of evidence of the defendants agreeing to accomplish a lawful purpose by unlawful means*, and that none of the matters complained of resulted in a miscarriage of justice, and that if any irregularities do exist in the proceedings, they are so unimportant they would not warrant the granting of a new trial. Accordingly, defendants' motions are denied." (Italics ours.)

Note the Trial Court's finding on the conspiracy count: *that the petitioners agreed to accomplish a lawful purpose by unlawful means.* We ask: *what unlawful means are set forth in the second count? What crime does it charge that the petitioners committed?* (Italics ours.)

In *Alderman v. The People*, 4 Mich. 414, the Supreme Court of Michigan had this to say:

> "It is equally well settled that a general charge of conspiracy to effect an object not criminal is not sufficient. The charge of such a conspiracy is to be accompanied with the further statement of the means the conspirators concerted and agreed to use to effect the object; *and those means must appear to be criminal.*" (Italics ours.)

and further,

> "If • • • the combination be to do an act, not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, *then those means must be particularly set forth*, and be such as constitute an offense, either at common law or by statute." (Italics ours.)

To the same effect, *People v. Barkelow*, 37 Mich. 455, wherein the Court stated:

> "There is no class of cases where defendants are better entitled to the protection of the law against vague charges than where they are charged with conspiracy. The course of legal experience has shown this to have been a familiar resort to catch innocent persons, by throwing a drag net of vague charges, and resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers. Titus Oates' plot has been a warning to all courts and jurists not to encourage any looseness in charges which in exciting times juries and communities are only too ready to catch at to punish those who are unfortunate enough to be suspected.
>
> The facts in the present case are not such as to show the injustice of the strict rule. The defendants certainly do not appear in an enviable light, and are probably dishonest swindlers. But this does not render them responsible for crimes not charged and proved against them. The proof is very slender if there is any proof that they obtained money by false pretenses. It indicates that they made promises which they did not mean to keep, and partly by this and partly by flattery and other cunning devices of sharpers induced people to order what they did not want and to trust to their promises not to hold them on such orders. It is not surprising that a jury with such culprits before it, should convict

them without any very close attention to law or facts. But this mode of doing justice is not favored in law, and needs no encouragement.

We think the information fatally defective so that no judgment can be given upon it. It must be certified to the circuit court that no judgment should be entered against the respondent but that judgment should be arrested and the prisoners discharged.

As there can be no new trial we need not pass upon the rulings."

Note what the Supreme Court of the United States says in *Gracnwald v. The United States*, 353 U.S. 391:

"We will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."

and we ask this Court to take particular note of Mr. Justice Jackson's opinion in connection with conspiracy prosecutions in *Krulewitch v. The United States*, 336 U.S. 440.

And in *Parr v. The United States*, 80 Supreme Court 1171, which holds:

"Convictions on count charging conspiracy to commit offense complained of in earlier count could not stand where conviction under substantive count were invalidated."

A pertinent part of the record in this case as made in the Trial Court is included herewith as an appendix. Petitioners were found Not Guilty of the charge to cheat and defraud the Lavracks. We urge that no crime is set forth or charged in the conspiracy count (*Thompson v. The City of Louisville*, 80 Supreme Court Reporter 624).

Wherefore your petitioners repectfully pray that this Court be pleased to grant a Writ of Certiorari directed

to the Supreme Court of the State of Michigan requiring that Court to certify a full and complete transcript of the record in the above entitled cause to this Court for its review and determination.

And your petitioners will ever pray.

.....

ALAN J. STONE,

.....

SAMUEL H. RUBIN,
Attorneys for Petitioners.

Dated: November .., 1961.

CERTIFICATE

We hereby certify that we are the attorneys for the petitioners herein, that the allegations of fact contained in said petition are true and that said petition in our opinion is well founded in Law as well as in fact.

.....

ALAN J. STONE,

.....

SAMUEL H. RUBIN,
3215 Cadillac Tower,
Detroit 26, Michigan.

Dated: November .., 1961.

APPENDIX

CRIMINAL WARRANT

State of Michigan,
County of Genesee – ss.

In Municipal Court, before Dale C. Showley, Municipal Judge, To the Sheriff or any Peace Officer of said County, Greeting:

Whereas: Gabrieline Lavrack has made complaint in writing, and on oath, to Dale C. Showley, a Municipal Judge of the City of Flint, in said County, that heretofore, to-wit, between June 9, 1960 and June 13, 1960, at the Township of Mt. Morris, in the County aforesaid,

COUNT I

Fred DeGillio and Milton Silverman, with intent to cheat and defraud one Mark Lavrack and Gabrieline Lavrack and fraudulently to obtain, by conveyance, the interest of the said Mark Lavrack and Gabrieline Lavrack, in and to Lot No. 195, David Berger Subdivision, No. 2, Genesee County, more commonly known as 6159 Penwood Street, Mt. Morris, from them, the said Mark Lavrack and Gabrieline Lavrack, did designedly and falsely represent and pretend that: the said defendant, Fred DeGillio, was a steward in the Teamsters' Union earning One Hundred and Seventy-Six ($176) Dollars per week; and that the said defendant, Milton Silverman, was purchasing said house for the said defendant, Fred DeGillio's personal occupancy; and that the said Mark Lavrack and Gabrieline Lavrack, would be free and clear of any and all liability relating to

said property upon Mark Lavrack's and Gabrieline Lavrack's lawful, legal conveyance of title by warranty deed to said property to the said defendant, Fred DeGillio and that the said Mark Lavrack and Gabrieline Lavrack, believing said false pretenses and representations so made as aforesaid by the said Fred DeGillio and Milton Silverman, was then and there deceived thereby, and was then and there induced by means thereof to deliver, and did then and there deliver the said real estate by conveyance of lawful and legal title thereto to the said Fred DeGillio and Milton Silverman, and the said Fred DeGillio and Milton Silverman, did then and there designedly, by means of false pretenses and representations so made as aforesaid, unlawfully and fraudulently obtain from the said Mark Lavrack and Gabrieline Lavrack, the said real estate, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the goods and property of the said Mark Lavrack and Gabrieline Lavrack, with intent to cheat and defraud them, the said Mark Lavrack and Gabrieline Lavrack, of the same; whereas in truth and in fact the said false pretenses and representations, so made as aforesaid and hereinbefore set forth, were utterly false and untrue, all of which was well-known to the defendants, Fred DeGillio and Milton Silverman, at the time of making the same to the said Mark Lavrack and Gabrieline Lavrack.

COUNT II

Fred DeGillio and Milton Silverman, unlawfully, falsely, deceitfully and fraudulently did combine, conspire, confederate, and agree together by divers false pretenses, subtle means and devices to obtain and acquire unto themselves, of and from Mark Lavrack and Gabrieline Lavrack, a conveyance of title to real estate located at 6159 Penwood Street in the Township of Mt. Morris, County of

Genesee and also known as Lot No. 195, David Berger Subdivision, No. 2, Genesee County, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the property of them, the said Mark Lavrack and Gabrieline Lavrack, and to cheat and defraud them, the said Mark Lavrack and Gabrieline Lavrack, thereof, to the great damage of them, the said Mark Lavrack and Gabrieline Lavrack.

In the Name of the People of the State of Michigan, you and each of you, are hereby commanded forthwith to arrest the said Fred Bernard DeGillio and Milton Silverman and bring them before me, to be dealt with according to law.

Given under my hand and seal, at the City of Flint, in said County, on the 19th day of January, A.D. 1961.

/s/ Dale C. Showley,
Municipal Judge.

EXHIBIT 3

STATEMENT OF MILTON SILVERMAN

Stenographic record of a conversation had between Mr. Robert F. Leonard and Mr. Milton Silverman, in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, at 6:10 o'clock p. m.

Present: Mr. Robert F. Leonard, Det. Edward Mongeon, Virginia Bertelsen, Court Reporter.

(Questions by Mr. Leonard and answers by Mr. Silverman:)

Mr. Leonard: Mr. Silverman, this is Virginia Bertelsen. She will take down what we say here. She is a stenographer.

Mr. Silverman: I will answer no questions when the machine is going.

Q. What is that?

A. I will answer no questions when the machine is going.

Q. You won't?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan. I have nothing more to say.

Q. Let me ask this, Mr. Silverman,—what kind of work are you in?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. And are you associated with anybody?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Have you been arrested before?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. You know anybody by the name of "Lavrack"?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan. You're wasting a lot of time.

Q. The machine is telling us a lot. Are you married?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Do you have any children?

A. I want to talk to my lawyer.

Q. Did you forget your name?

A. I want to speak to an attorney; I want to make a 'phone call.

Q. You will get a chance to do that.

A. I waited an hour and half now. I haven't made a phone call yet. I have been in custody an hour and a half.

Q. You will get to make the phone call when we say you can.

A. I understand that, nothing new, I am incarcerated.

Q. That's right. All right, now, how long have you been buying real estate?

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Have you been arrested before?

A. I will answer no questions when the machine is going.

Q. Are you on Federal probation now?

A. I will answer no questions when the machine is going.

Q. Are you on Federal probation?

A. I live at 13241 Dartmouth, Oak Park, Michigan.

Mr. Leonard: O. K.

(To the reporter): That is all.

(Statement concluded at 6:15 o'clock p. m.)

State of Michigan,
County of Genesee—ss.

I, Virginia Bertelsen, do hereby certify that I reported stenographically a conversation had between Mr. Robert F. Leonard and Mr. Milton Silverman in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, and that the foregoing and attached three pages constitute a full and correct transcript of the stenograph notes taken by me of said conversation.

Virginia Bertelsen,
Court Reporter.

Flint, Michigan
January 24, 1961.

EXHIBIT 4

STATEMENT OF FRED BERNARD DeGILLIO

Stenographic record of a conversation had between Mr. Robert F. Leonard and Mr. Fred Bernard DeGillio, in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, at 5:10 o'clock p. m.

Present: Mr. Robert F. Leonard, Assistant Prosecuting Attorney, Det. Edward Mongeon, Virginia Bertelsen, Court Reporter.

(Questions by Mr. Leonard and answers by Mr. DeGillio, unless otherwise indicated:)

Mr. Leonard: Mr. DeGillio—

A. Yes, sir.

Mr. Leonard: This is Miss Bertelsen, and what we say will be taken down by her. We want to ask you some questions about a particular incident, and we would like you to answer them truthfully, if you would.

Q. What is your full name?

A. Fred Bernard DeGillio.

Q. Where do you live, Fred?

A. 202 Rush Street, Garden City, Michigan.

Q. How old are you?

A. I am forty-four years old. I think that's right, let's see,—about forty-five; I will be forty-five, come in May.

Q. What is your occupation?

A. I am an investor.

Q. How long have you been in this investment line?

A. Approximately three years, two or three years.

Q. Are you married?

A. Yes, sir.

Q. You have any children?

A. Yes, sir.

Q. How many children do you have?

A. Three.

Q. I'm sorry,—did you say you live in Garden City?

A. That's right.

Q. And are you in partnership or anything with anybody, or association?

A Let me say something here: I prefer not answering any more questions. I think I am entitled to an attorney. I have asked this gentleman here, and he says I was. Now, I would like to have an attorney. I don't know where I am going or what is happening here. I don't even know why I was picked up. Now, they said I was picked up on a—some kind of a charge. I don't know what it is. I prefer to have an attorney. I have given my name and address, and I think I am entitled to an attorney.

Q. Well, you are entitled to an attorney, Mr. DeGillio, but we are entitled, as law enforcement officers, also to question you.

A. You can question me, sir. I don't want no argument.

Q. Now, are you a member of the Teamsters Union?

A. I am not a member now; I am an inactive member. I have been a member in the Teamsters Union. If you don't mind I prefer not answering any more questions.

Q. What is your Local?

A. What is my what?

Q. Your local?

A. Local what?

Q. Union.

A. My local Union?

Q. Yes. You say you were a member, or you are an inactive member. I want to know what your Local is.

A. I am not an active member of the Teamsters Local.

Q. Did you have a Local when you were active?

A. I prefer not answering any more questions, sir, please.

Q. Do you know any people by the name of Lavrack, Mark and Gabrielene Lavrack, that lived at 6159 Penwood Street in the Township of Mt. Morris, in Genesee County?

A. I have heard the name, but I don't recall them.

Q. You don't recall them?

A. Not offhand, no, sir.

Q. Have you ever told any of these people that, or these people you dealt with on these houses that you were a member of the Teamsters Union?

A. I prefer not answering any more questions, sir.

Q. Have you ever told them how much you make a week, these same people; have you ever told them that?

A. I prefer not answering the question.

Q. Do you have any other occupation besides this so-called investment business?

A. No, sir, no other occupation.

Q. How often do you come to Flint or Genesee County in a week?

A. A couple times.

Q. Where are your offices located?

A. I have no office, sir.

Q. What type of investments do you make?

A. I prefer not answering any more questions. I want to see a lawyer.

Q. Do you deal in real estate?

A. I prefer not answering questions.

Q. Mr. DeGillio, you are being, or you have been arrested for the crime of obtaining property under false pretenses, as well as conspiracy to obtain property under false pretenses; in particular, you are charged with obtaining the property of one Mark and Gabrielene Lavrack, real estate property located at 6159 Penwood Street in the

Township of Mt. Morris, County of Genesee, on or about the 15th day of June, 1960.

Now, that you know what it is all about, do you recall the people in question?

A. I appreciate you telling me what I was picked up for, arrested for, and I decline answering any more questions without an attorney. Now, I have that right, I do think.

Q. You apparently haven't heard me. I said we have a right to investigate a case. We have a right to question witnesses.

A. You're arresting me; I can't stop you from arresting me.

Q. That is exactly right.

A. I can't argue the point. They picked me up off the street like a criminal.

Q. There is a question, isn't there, Mr. DeGillio, that you may be a criminal. We think you are; that is why we issued a warrant.

A. That is fine. Then I am entitled to go to court on this.

Q. That's right.

A. To find out if I am a criminal.

Q. We are entitled to investigate a case.

A. All right, investigate it.

Q. And we are right now, and that entitles us to ask you questions.

A. Ask me the questions.

Q. What do your investments include, Mr. DeGillio?

A. I assure you, sir, I am entitled to an attorney, and I'd like to speak with an attorney. I am not answering any more questions. If you want to book me, you can book me. Do what you like with me, but I am—I decline to answer any questions.

Q. Have you been arrested before?

A. I am entitled—no, sir, I have not been arrested before.

Q. You never have?

A. Never have. I don't know what is going on. I have never been arrested before, but I do know I am entitled, as a citizen entitled to an attorney. This I am entitled to. If I am not entitled to an attorney, I can't help you out. Then I don't know what I am entitled to. You're charging me with a serious charge here.

Q. That's right.

A. I think I am entitled to an attorney. It is a very serious charge.

Q. That's right.

A. So I am entitled to an attorney. I'd like to speak to him.

Mr. Leonard: You will get that opportunity.

(To the reporter): That is all.

(Statement concluded at 5:20 o'clock p. m.)

State of Michigan,
County of Genesee—ss.

I, Virginia Bertelsen, do hereby certify that I reported stenographically a conversation had between Mr. Robert F. Leonard and Mr. Fred Bernard DeGillio, in the office of the Prosecuting Attorney, Courthouse, Flint, Michigan, on Wednesday, January 18, 1961, and the foregoing and attached seven pages constitute a full and correct transcript of the stenograph notes taken by me of said conversation.

Virginia Bertelsen,
Court Reporter.

Flint, Michigan,
January 24, 1961.

EXCERPT FROM PRELIMINARY EXAMINATION

Flint, Michigan.
Wednesday, February 15, 1961.

Mr. Leonard: If the Court please, this is in the matter of the People of the State of Michigan v. Fred DeGillio and Milton Silverman. The People are ready to proceed, your Honor. I understand the defendants are in court.

The Court: Want to take chairs up there?

Respondent Silverman: Your Honor, can I see the file?

The Court: Sure. You've got a copy of it.

Respondent Silverman: The papers were delivered, your Honor. As far as the record as far as the motions are concerned, the complete file: this is only the copy of the complaint, your Honor.

The Court: The warrant's right there, too.

Respondent Silverman: I am looking for the complete file. Can I see it, your Honor.

The Court: That's all. There's the warrant.

Respondent Silverman: Your Honor, as I recollect you told me in open court he would put the letter I delivered to him —

The Court: The letter's right there.

Respondent Silverman: So it is, your Honor.

Judge Baker, I delivered to the Court and your Honor personally Tuesday, February 14, 1961 a copy of this letter to your Honor.

The Court: The Court is well aware of that.

Respondent Silverman: A letter from my attorney, Mr. Al Goldfarb stating that he is trying a criminal case in Federal Court, Eastern District, Detroit, Michigan, in Judge Freeman's courtroom, where he asked the Judge for the case to be postponed one day until Thursday, Feb-

ruary 16, 1961. I paid my attorney Albert Goldfarb for his services as my legal counsel and I want him to appear in my behalf and I want a stay in proceedings until he can appear in my behalf. I am unable to get another lawyer in such short notice.

I called Mr. Samuel N. Rubin from your Honor's office yesterday and I reached Mr. Samuel N. Rubin in the courthouse in Detroit. I was unable to reach Mr. Goldfarb, he was trying a case in front of a jury in Judge Freeman's Court. And I went to Mr. Rubin at 4:30 yesterday afternoon and he told me that he couldn't appear in such a short notice to try the case properly. And, in fact, as of this morning he had a Circuit Court matter in Judge Culehan's courtroom for Wednesday morning, this morning, in Detroit in Circuit Court.

Our rights are in jeopardy by me not having proper counsel and ask the Court to be adjourned until tomorrow morning. I believe the case in front of the Federal jury will be over. In fact, I will ask your Honor to call Judge Freeman's court. I have a credit card and I will pay for the call to verify he was trying a criminal matter in front of a jury, which he started previously, the case started.

Yesterday he talked to Mr. Leonard on the 'phone and stated the case might run an extra day. In fact, yesterday, prior to delivering the letter to your Honor I delivered a letter to Mr. Leonard. I asked Mr. Leonard if Thursday was convenient for him, or any other day, preferably. He told me that Thursday would be as preferable to him as of Wednesday, although, he had – he'd have to notify witnesses to appear on Thursday morning. When I walked in the courtroom yesterday afternoon he told me this, he called the Court, that is what the officer in the courtroom did, and definitely didn't want a postponement for Thursday.

Mr. Leonard: If the Court please, this matter has been pending since January 19th; at the request of the defense counsel we agreed to an adjournment until this particular date, the reason being that apparently his counsel has been tied up in court in Detroit.

First, that Mr. Silverman indicated that Mr. Goldfarb or Goldfab talked to me regarding the adjournment until today, that's not true at all. I never talked to him on the telephone about an adjournment until today. This letter indicates that he attempted to get ahold of me.

Second, I never told—

Respondent Silverman: That is not right.

Mr. Leonard: Just a minute.

The Court: Just a minute.

Mr. Leonard: Secondly, Mr. Silverman is not correct when he says I told him today would be all right with me. My statement was that if the Judge agrees with that I would have no argument against it. However, I have issued or had subpoenas issued for these witnesses, they have been subpoenaed, and it would be difficult to call them off. Now, we have subpoenaed eight or ten witnesses, your Honor, and they are present in court and we are ready to proceed.

The Court: I think that there's one thing that's been overlooked here, too: In the first place, both respondents were represented by Mr. Goldberg and then substitution of attorneys was made and there was a request then for an adjournment and I wasn't going to adjourn the case then, I saw no reason for it; and the only reason it was adjourned last time was on the request of the Prosecuting Attorney that there be an adjournment. As I understand it, it was definitely understood that there would be no further adjournment, and that Mr. Goldfarb had his business in such a condition that he would be able to be here and represent him. If he didn't, that's too bad, as far as I

am concerned. Counsel or no counsel, as far as I am concerned, the case will proceed as scheduled.

Respondent Silverman: Your Honor—

The Court: You sit down.

Respondent Silverman: I can't answer—

The Court: You can sit down.

Respondent DeGillio: Judge Baker, Your Honor, my attorney has informed this Court that he could not appear here today because he is in Federal Court today in front of Judge Freeman.

The Court: He knew that when he made—

Respondent DeGillio: I have paid my attorney—

The Court: You just sit down and we'll go ahead with it.

Mr. Leonard: Gabrieline Lavrack, want to come up here, please.

INFORMATION—GENERAL

State of Michigan

The Circuit Court for the County of Genessee

Walter P. Kuta, Prosecuting Attorney for said County, for and in behalf of the people of the State of Michigan, comes into said Court, in the February A.D. 1961 term thereof, and gives it hereof to understand and be informed that Fred Bernard DeGillio and Milton Silverman heretofore, to wit on or about the 9th day of June in the year one thousand nine hundred and sixty at the Township of Mt. Morris in said Genesee County,

COUNT I

between that date and June 13, A.D., 1960, with intent to cheat and defraud one Mark Lavrack and Gabrieline Lavrack and fraudulently to obtain, by conveyance, the interest of the said Mark Lavrack and Gabrieline Lavrack, in and to Lot No. 195, David Berger Subdivision, No. Two (2) Genesee County, more commonly known as 6159 Penwood Street, Mt. Morris, from them, the said Mark Lavrack and Gabrieline Lavrack, did designedly and falsely represent and pretend that: the said Defendant, Fred DeGillio, was a steward in the Teamsters' Union earning One Hundred and Seventy-Six ($176) Dollars per week; and that the said Defendant, Milton Silverman, was purchasing said house for the said Defendant, Fred DeGillio's personal occupancy; and that the said Mark Lavrack and Gabrieline Lavrack, would be free and clear of any and all liability relating to said property upon Mark Lavrack's and Gabrieline Lavrack's lawful, legal conveyance of title by warranty deed to said property to the said Defendant, Fred DeGillio, and that the said Mark Lavrack and Gabrieline Lavrack, believing said false pretenses and representations so made as aforesaid by the said Fred DeGillio and Milton Silverman, was then and there deceived thereby, and was then and there induced by means thereof to deliver, and did then and there deliver the said real estate by conveyance of lawful and legal title thereto to the said Fred DeGillio and Milton Silverman, and the said Fred DeGillio and Milton Silverman, did then and there designedly, by means of false pretenses and representations so made as aforesaid, unlawfully and fraudulently obtain from the said Mark Lavrack and Gabrieline Lavrack, the said real estate, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars, of the goods and property of the said Mark Lavrack and Gabrieline Lavrack, with in-

tent to cheat and defraud them, the said Mark Lavrack and Gabrieline Lavrack, of the same; whereas in truth and in fact the said false pretenses and representations, so made as aforesaid and hereinbefore set forth, were utterly false and untrue, all of which was well-known to the said Defendants, Fred DeGillio and Milton Silverman, at the time of making the same to the said Mark Lavrack and Gabrieline Lavrack, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

COUNT II

The said Walter P. Kuta, Prosecuting Attorney, further gives the Court to understand and be informed, that at the time and place aforesaid, the said Fred DeGillio and Milton Silverman unlawfully, falsely, deceitfully and fraudulently did combine, conspire, confederate, and agree together by divers false pretenses, subtle means and devises to obtain and acquire unto themselves, of and from Mark Lavrack and Gabrieline Lavrack, a conveyance of title to real estate located at 6159 Penwood Street in the Township of Mt. Morris, County of Genesee and also known as Lot No. 195, David Berger Subdivision, No. Two (2), Genesee County, of the value of Thirteen Thousand Two Hundred ($13,200) Dollars of the property of them, the said Mark Lavrack and Gabrieline Lavrack, thereof, to the great damage of them, the said Mark Lavrack and Gabrieline Lavrack, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

.....

Prosecuting Attorney for
the County of Genessee.

MOTION TO QUASH INFORMATION

Come now the Defendants by Albert A. Goldfarb, their attorney, and move this Court to quash the information filed herein for the following reasons:

1. Because the alleged preliminary examination upon which certain information is based fails to disclose that the Defendants committeed any crime.

2. Because at said alleged preliminary examination, the Defendants' rights were violated in a manner repugnant to their rights under the Constitution of the United States and of the Constitution of the State of Michigan, in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution and Article II, Section 19 of the Constitution of the State of Michigan.

3. Because the examining magistrate lacked jurisdiction and said proceedings were conducted in violation of Section 28.922 of the Michigan Statutes Annotated.

4. Without waiving the benefit of the foregoing Motion, Defendants in the alternative, request the Court to remand this cause to the examining magistrate for further hearing so that these Defendants might urge the grounds herein before set forth as a basis for quashing the complaint and warrant.

5. This Motion is based upon the files and records in this cause and upon the affidavit of Albert A. Goldfarb, the attorney for the Defendants.

Albert A. Goldfarb,
Attorney for Defendants,
2001 Cadillac Tower,
Detroit 26, Michigan.

Samuel H. Rubin,
Of Counsel.

Dated: February 18, 1961.

AFFIDAVIT

State of Michigan,
County of Wayne—ss.

Albert A. Goldfarb, a duly licensed attorney, being duly sworn deposes and says, that on January 24, 1961, your deponent contacted Robert F. Leonard, Assistant Prosecuting Attorney for the County of Genesee, City of Flint, State of Michigan, by telephone at the telephone number CEdar 2-9185, and that a conversation ensued between your deponent and the said Robert F. Leonard, relative to an adjournment in the matter of the People of the State of Michigan vs. Fred Bernard DeGillio and Milton Silverman; that during said conversation your deponent informed Mr. Leonard that he sought an adjournment in this particular matter, the preliminary hearing thereof, until some time in March, 1961, due to previous commitments as to trial dates set in the various courts located in the State of Michigan.

Further, your deponent states that previous to this, a copy of your deponent's trial schedule was delivered to Fred Bernard DeGillio, who in turn delivered said schedule to the Honorable Basil B. Baker, Municipal Judge, Flint, Michigan.

Your deponent further states that during the conversation between your deponent and Mr. Robert F. Leonard, Mr. Leonard informed your deponent that he would not consent to an adjournment into the month of March, 1961, whereupon your deponent notified Mr. Leonard as to his schedule, asserting that there was a possibility that he might be able to conclude a matter scheduled for trial February 9, 1961, before the Honorable Ralph M. Freeman, United States District Judge for the Eastern District of Michigan, by February 15, 1961 or February 16, 1961; whereupon Mr. Leonard informed your deponent that he understood the fact that this deponent's schedule during this period was full.

Your deponent further asserts that during the conversation between your deponent and Mr. Leonard, that your deponent informed Mr. Leonard that he would attempt to arrange his schedule to include the examination in regards to the case of The People of the State of Michigan vs. Fred Bernard DeGillio and Milton Silverman; informing Mr. Leonard that a murder trial was scheduled in the Recorders Court for the City of Detroit in the Case of the People vs. Myron Prewitt, said trial scheduled for February 20, 1961.

Further, your deponent asserts that on February 13, 1961, when it appeared that it was impossible to conclude the matter being tried before the Honorable Ralph M. Freeman, United States District Judge for the Eastern

District of Michigan, in the matter of the case of The United States vs. William Henry Hackett, #38420; that prior to the temporarily adjourned date of the preliminary hearing of February 15, 1961, your deponent immediately attempted to call Mr. Robert F. Leonard, Assistant Prosecuting Attorney for Genesee County, State of Michigan, to inform him of the situation, at which time your deponent learned that the office of the prosecuting attorney for Genesee County was closed on that date due to the celebration of Lincoln's birthday.

Your deponent further states that from February 9, 1961 through February 16, 1961, your deponent was engaged in a trial defending William Henry Hackett, as aforesaid, without any delay or adjournment, and that during that period the usual court hours were observed, being that of 9:30 A.M. through 4:30 P.M. or 5:00 P.M. during the period aforementioned.

Further your deponent asserts that a letter was dictated on February 13, 1961, a verifax copy thereof being part and parcel to this Affidavit, to Mr. Robert F. Leonard, requesting a brief adjournment in this particular matter; said letter was delivered to Milton Silverman and upon information and belief, your deponent believes said letter to have been delivered to Mr. Robert F. Leonard, a copy of which was delivered to the Honorable Basil B. Baker, Municipal Judge for Flint, Michigan.

Further deponent sayeth not.

/s/ Albert A. Goldfarb,
Albert A. Goldfarb.

Subscribed and sworn to before me this .... day of February, 1961.

/s/ .....
Notary Public, Wayne County, Michigan,
My commission expires: .....

ALBERT A. GOLDFARB
Attorney at Law

2001-3-5 Cadillac Tower
Detroit 26, Michigan

February 13, 1961.

Mr. Robert F. Leonard,
Assistant Prosecuting Attorney
for Genesee County,
Courthouse Building,
Flint, Michigan.

Dear Mr. Leonard:

I attempted to telephone you this morning, relative to an adjournment of one day Re: The People of the State of Michigan v. Milton Silverman and Fred DeGillio, but as you know, today seems to be a belated celebration of Lincoln's birthday.

I am now in trial in the United States District Court for the Eastern District of Michigan, in the case of U. S. v. William Henry Hackett, No. 38420, before the Hon. Ralph M. Freeman, United States District Judge for the Eastern District of Michigan. There have been certain circumstances which have taken place during this trial which have caused it to go beyond the time originally anticipated. It appears, however, that the matter should be concluded by

Wednesday afternoon, therefore permitting me to be in Genesee County to represent Fred DeGillio, in the matter pending in Genesee County.

I would appreciate your extending to me this one day of grace.

Very truly yours,

Albert A. Goldfarb.

AAG:ohb.

oc Judge Basil B. Baker,
Municipal Judge,
Flint, Michigan.

OPINION ON RESPONDENT'S MOTION TO QUASH INFORMATION AND REMAND TO MUNICIPAL COURT

Respondents have moved to Quash the Information herein urging two grounds. The first ground being a lack of evidence of any crime, the second ground alleging denial of the Constitutional right to be represented by Counsel at the Preliminary Examination.

With respect to the first ground, the Court has read the transcript of the testimony taken at the Preliminary Examination and is satisfied sufficient evidence appears therein to warrant the respondents being bound to Circuit Court for trial.

A review of the file indicates the second reason alleged is completely invalid. Respondents did have Counsel who appeared and requested adjournment on January 23, 1961 to February 15, 1961, and waived the ten day provision of the Statute. Counsel then failed to appear for the examination at the February 15th date he had requested.

Representation on Preliminary Examination is permissible not mandatory. *Pco. v. Podolski*, 332 Mich. 508. Even if a right to be represented by Counsel at Preliminary Examination did exist, it does not mean the judicial process stops because the Counsel hired failed or refused to appear. Courts still set hearing and trial dates, not defense Counsel. Furthermore, the right to Counsel does not mean the right to any particular lawyer, especially where that lawyer is too busy to handle his clients' affairs or to appear in Court at the date he was requested or agreed to.

Respondent's Motion to Quash the Information and to Remand is hereby denied. Respondents will appear for Arraignment March 13, 1961 at 9:00 A. M.

/s/ Donn D. Parker,
Circuit Judge.

Dated: March 9. A.D., 1961.

A True Copy:
George G. Dunn, Clerk.

EXCERPT FROM CHARGE OF COURT AS TO EXHIBITS 3 AND 4

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(14) The Court: The Court will charge you as to Exhibits 3 and 4, which are statements of the respondents taken January 18, 1961, that if you find or believe these statements were secured by threats or by force or violence you should not consider them. If you find they were voluntarily given you may consider them in your deliberation.

Mr. Rubin: Your Honor, may I (15) interrupt, please. Would your Honor give me permission to have that request just as I wrote it to go into the record so that at least I would have something there? You see, your Honor hasn't given it as I requested.

The Court: Well, I think—

Mr. Leonard: Could we not do this after the jury is—

Mr. Rubin: I have no objection, but I would like to have it in the record.

The Court: All right, I'll put it in, including the time you gave it to me; but I won't do it in front of the jury.

Mr. Rubin: Yes, I know, sir.

The Court: Will you draw two names out of the box.

(Whereupon two jurors were excused, the Court Officer's oath administered, and at 11:42 a.m. the jury retired to the jury room to deliberate.)

The Court: You wanted to put something on the record.

Mr. Rubin: With the Court's permission. Your Honor, at the close of your charge, asked if we had (16) any further corrections, additions, requests to make in connection therewith, and I handed up to your Honor a request I wrote out in handwriting—oh, I imagine it was around 11:35 or 11:40. What I requested, your Honor, was to charge the jury as follows: "I charge you that statements offered in evidence, taken of the defendants after arrest, cannot be

considered by you in this case and you should disregard the statements." And if my memory is correct, those Exhibits are 3 and 4 —

Mr. Leonard: People's Exhibits 3 and 4.

The Court: Yes.

Mr. Rubin: People's Exhibits 3 and 4. Since the case is going to the jury strictly on the count of conspiracy as to the defendants, as I understand it, your Honor stated that you will give your own charge

The Court: Well, the record shows what I stated, and, you just put on the record

Mr. Rubin: I'm sorry, I'm sorry. Your Honor then gave your own charge in that connection.

The Court: Yes.

Mr. Rubin: Thank you very much.

The Court: All right.

Mr. Rubin: And I would like to be (17) considered on the record before the jury retired, so that it wouldn't appear as if I gave it to you now.

The Court: Yes, you gave it to me right at the end of my charge.

All right.

* * * * *

MOTION IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

Come now the defendants, Fred Bernard DeGillio and Milton Silverman, by Samuel H. Rubin, their attorney, and move this Court for an Order setting aside the verdict of guilty found by the jury in this cause and pray:

First: That the judgment of conviction be arrested.

Second: That this Court direct a verdict of not guilty.

Third: In the alternative; grant a new trial for the following reasons:

1. Because the verdict of the jury is contrary to law in that:

A. The jury returned a verdict of guilty as charged when as a matter of fact, the Court had directed the jury to find the defendants not guilty on the first count, namely of obtaining property under false pretenses, and thereupon under the prodding of the Court the jury announced a verdict of not guilty on the first count, and a verdict of guilty on the second count, namely conspiracy to cheat and defraud.

B. Because no crime is charged in Count II of the information.

2. Because the verdict of the jury is contrary to the evidence in that:

A. There is no evidence that the defendants agreed to make representations to the complainants of any past or existing fact, and no evidence of any agreement that the complainants would rely thereon.

3. Because the jury having found that the defendants were not guilty of having fraudulently obtained property of the complainants by statements of past or existing facts which were untrue and upon which the complainants relied, the finding of guilty on the conspiracy count finds no basis in law since there is no evidence of any agreement to which the complainants were a party and to which they agreed to rely upon, misstatements of past and existing facts.

4. Because the Court erred in admitting into evidence over the objections of these defendants, the statement of Fred Bernard DeGillio, taken from him after his arrest and

the statement of Milton Silverman, taken from him after his arrest.

5. Because the Court erred in denying Defendants' Motion to Quash the Information prior to the jury being impaneled, in which motion it was alleged:

A. That the evidence before the examining magistrate failed to disclose that the defendants committed any crime.

B. That the defendants were denied their right to counsel, in violation of the Constitution of the United States and the Constitution of the State of Michigan.

6. Because the Court erred in failing to give to the jury the following charge requested by the defendants:

"I charge you that statements offered in evidence after the arrest of the defendants cannot be considered by you in this case, and you should disregard the statements."

7. Because the closing argument of the Prosecuting Attorney was inflammatory, appealed to the passions and prejudices of the jury in his statements to that jury:

A. That these defendants cheated the Lavricks; stole from the poor.

B. His statements to the jury to bring in a verdict of guilty solely to impress upon the defendants that the local citizenry does not want foreigners to come into the community and cheat the local citizenry.

8. That the evidence fails to disclose venue of the alleged crime within the jurisdiction of this Court.

This motion is based upon the files and records in this cause and upon the affidavit hereto attached.

/s/ Samuel H. Rubin,
Attorney for Defendants,
3215 Cadillac Tower,
Detroit 26, Michigan.

Dated: May 17, 1961.

State of Michigan,
County of Wayne—ss.

Samuel H. Rubin, being duly sworn deposes and says that he is the attorney for Fred Bernard DeGillio and Milton Silverman, the defendants herein; that he has read the foregoing motion; that in his opinion the conviction of the defendants is erroneous; that said motion is meritorious and is not filed for the purpose of delay.

/s/ Samuel H. Rubin.

Subscribed and sworn to before me this 17th day of May, 1961.

/s/ Olga B. Krause,
Notary Public, Wayne County, Michigan.
My commission expires December 14, 1962.

EXCERPTS FROM PROCEEDINGS OF JULY 18, 1961

STATE OF MICHIGAN—In the Circuit Court for the County of Genesee.

The People of the State of Michigan,
v.
Fred B. DeGillio and
Milton Silverman,
Defendants.
No.

Proceedings had in the above entitled cause before Donn D. Parker, Circuit Judge, Genesee County Courthouse, Flint, Michigan, on July 18, 1961.

Appearances: Samuel Rubin, Counsel for the respondents.

• • • • •

The Court: • • • (3) In discussing the claims and reasons given for a new trial, the Court will discuss them in the order they are presented in the defendant's motion, starting with 1(a). Counsel addresses this objection to the form in which the verdict was delivered by the jury. Although the foreman fumbled a little bit with his words, it was clear and convincing to the Court what he intended to express, and the jurors so indicated, and that was clearly not guilty as to Count 1 and guilty on Count 2, the conspiracy count.

• • • • •

(4) 4, which has to do with the statements of the two respondents which were admitted into evidence; the true situation here is, I think, that the statements and their contents contained no evidence of anything, either guilt or

innocence, and the Court feels it gave an adequate instruction regarding their effect.

• • • • •

6, which is my failure to give the charge requested by the defendant; this is very similar (5) to 4—I guess it is. I can't see how the defense was prejudiced here. I'll say the same thing I said on number 4, and that is that the statements, so-called, were really evidence of nothing. My memory is that all that was in them was the name and address and very little more, and at most they were surplusage, and the Court still thinks the instruction that he gave regarding them was the proper law in Michigan and I cannot find that it prejudiced the defendants in any way.

• • • • •

In general, the Court will say it thought there was plenty of evidence of the defendants agreeing to accomplish a lawful purpose by unlawful means, and that none of the matters complained of resulted in a miscarriage of justice, and that if any irregularities do exist in the proceedings, they are so unimportant they would (6) not warrant the granting of a new trial. Accordingly, defendant's motions are denied.

• • • • •

(7) The Court: Well, I'll not—I'll deny that motion, I mean we might as well get the sentence final and you on your road to the Supreme Court.

• • • • •

(8) Mr. DeGillio, you have been convicted of conspiracy to cheat and defraud with false pretenses. At the outset the Court wants you to understand fully that there is nothing illegal about purchasing equities in real estate or anything else, by lawful means. It is illegal, however, and it's one of the oldest crimes known to the law, to agree or to

conspire with another to purchase equities or anything else, by unlawful methods or means.

• • • • •

ORDER OF SUPREME COURT DENYING LEAVE TO APPEAL

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 8th day of August in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

In this cause an application is filed by defendants for leave to appeal from an order of the Circuit Court for the County of Genesee and a brief in opposition thereto having been filed by plaintiff and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby Denied.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th

day of August in the year of our Lord one thousand nine hundred and sixty-one.

/s/ Donald F. Winters,
Clerk.

(Seal)

ORDER OF SUPREME COURT DENYING REHEARING

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 21st day of September in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

In this cause a motion is filed by defendants for a reconsideration of the order heretofore entered herein on August 8, 1961, and an answer thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the order heretofore entered herein on August 8, 1961 denying leave to appeal stand affirmed.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 27th day of September in the year of our Lord one thousand nine hundred and sixty-one.

/s/ Donald F. Winters,
Clerk.

(Seal)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1961

No. 888

[redacted]
and
[redacted]
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Petition for Certiorari to the Supreme Court of the State of Michigan

BRIEF OPPOSING PETITION FOR CERTIORARI

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1961

No. 593

FRED BERNARD DEGILLIO AND
MILTON SILVERMAN
Petitioners,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On application for Certiorari to the Supreme Court of the State of Michigan

BRIEF OPPOSING PETITION FOR CERTIORARI

I

OPINIONS OF COURTS BELOW

Respondents adopt petitioners Appendix and add Appendix B. Unless otherwise indicated, numbers in parentheses throughout this response refer to pages of our joint appendix, found in petitioners' brief and Appendix B of respondent's brief.

Attached to the joint appendix are two orders of the Michigan Supreme Court. In the order dated August 8,

1961, the Court denied petitioners application for leave to Appeal. Also included is the order dated September 21, 1961, in which the Court denied a petition for rehearing.

II

COUNTER-STATEMENT ON JURISDICTION

It is our position that the petition for certiorari presents no substantial Federal questions, and that such questions as are raised therein are frivolous.

III

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Do petitioners have a constitutional right to counsel during a preliminary interrogation?

2. Were petitioners denied due process of law under the Fourteenth Amendment by the Trial Judge's refusal to grant a continuance?

3. Were petitioners denied a fair trial by the admission into evidence of statements made during a preliminary interrogation?

4. Were petitioners informed of the nature and cause of the accusation?

IV

COUNTER-STATEMENT OF FACTS

Mark and Gabrieline Lavrack were purchasing a home

located at 6159 Penwood Street, Mt. Morris, Michigan, subject to a mortgage with a balance owing of $13,878.73.

In June 1960, petitioners Silverman and DeGillio represented to the Lavracks that they were desirous of purchasing their home for petitioner DeGillio's personal occupancy; and that the Lavracks would be free of all personal liability under the mortgage. In addition, petitioner DeGillio promised to pay the sum of $500 cash. Petitioner DeGillio, moreover, represented that he was earning One Hundred and Seventy-Six ($176) Dollars per week as a steward in the Teamsters' Union. On the basis of these representations petitioner DeGillio purchased the property, receiving a warranty deed from the Lavracks' real estate agent.

In January of 1961 the Lavracks signed a complaint charging petitioners Fred B. DeGillio and Milton Silverman with obtaining real estate of the value of $13,200.00, on alleged misrepresentations; a.) that the petitioner DeGillio was a stewart in the Teamsters' Union earning $176.00 per week; b.) that Silverman was purchasing the house for DeGillio's personal occupancy; c.) that the Lavracks would be free from any and all liability under the mortgage. A warrant was issued and petitioners taken into custody.

Then on January 18, 1961, petitioner DeGillio was interrogated by the Prosecuting Attorney and police in the office of the Prosecuting Attorney beginning at 5:10 p.m. and ending 5:20 p.m. During the course of the interrogation, the following colloquy took place:

A. You're arresting me; I can't stop you from arresting me.

Q. That is exactly right.

A. I can't argue the point. They picked me up off the street like a criminal.

Q. There is a question, isn't there, Mr. DeGillio, that you may be a criminal. We think you are; that is why we issued a warrant.

A. That is fine. Then I am entitled to go to court on this.

Q. That's right.

A. To find out if I am a criminal.

Q. We are entitled to investigate a case.

Also, on the same day petitioner Silverman was interrogated beginning at 6:10 pm and ending 6:15 pm (3a). During the course of the interrogation, the following colloquy took place:

A. My name is Milton Silverman; I live at 13241 Dartmouth, Oak Park, Michigan.

Q. Have you been arrested before?

A. I will answer no question when the machine is going.

Q. Are you on Federal probation now?

A. I will answer no question when the machine is going.

Q. Are you on Federal probation?

A. I live at 13241 Dartmouth, Oak Park, Michigan.

Mr. Leonard: O.K.

(To the reporter): That is all.

(Statement concluded at 6:15 pm).

Petitioners were then arraigned before an examining magistrate on the warrant and examination was set for January 26, 1961. At the request of Mr. Albert A. Goldfarb, petitioners' attorney, the examination was continued to February 15, 1961.

On February 14, 1961, at approximately 4:45 pm, petitioner Silverman appeared at the office of the Genesee County prosecutor, with a letter from Attorney Albert Goldfarb, seeking another continuance, because he was trying a case in Detroit and would not be available for examination on the following day. Petitioner Silverman was informed by the Prosecuting Attorney that 11 witnesses had been subpoened to testify at the examination, and that it would be impossible at that late hour to call the subpoenas off since some of the witnesses were coming from out of town. Petitioner Silverman was advised to appear the following day in Municipal Court with an attorney ready to proceed with the examination. On February 15, 1961, the examining magistrate formally denied the request for a continuance and proceeded with the preliminary examination (14a). At its conclusion, petitioners were bound over to circuit court for the county of Genesee for trial.

An information was filed charging petitioners with two counts, (1) of obtaining property by false pretenses and (2) conspiracy to cheat and defraud (15a - 16a).

"Motion to quash the Information was filed on behalf of the petitioners in which it was asserted that at said . . . preliminary examination the petitioners' constitutional rights were violated in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution. This motion was, on the 9th

day of March, 1961, denied by the trial judge (App 17a - 23a)." (Petitioners' brief p 4).

The statments of petitioners made during the preliminary interrogation were admitted into evidence as Exhibit 3 and 4 (24a - 25a). The record shows that they were not, however, used as a basis for argument to the jury. [B-2]

The Court directed a verdict of not guilty on the count of obtaining property under false pretenses. The jury, as directed, returned a verdict of not guilty on that count but returned a verdict of guilty on the conspiracy count (26a).

> "On Motion for a new trial, the petitioners . . . [contended] . . . that their Constitutional rights to counsel and of Due Process were denied them. On the 18th day of July, 1961, the Trial Judge overruled the Motion, sentenced the petitioner DeGillio to pay a fine of $7,500.00 within 48 hours, pay costs, within one week, of $900.00, spend 30 days in jail and 4 years probation; and on said day sentenced the petitioner Silverman to Jackson Prison for not less than 4-½ nor more than 5 years (Appendix 29a - 31a)." (petitioners' brief p 5).

> " . . . while the petitioner DeGillio was in the County Jail, the Trial Judge revoked petitioner DeGillio's probation on the ground that he had not paid within 48 hours the $7,500.00 fine, and within one week the $900.00 costs, and sentenced petitioner DeGillio to Jackson Prison for not less than 2-½ nor more than 5 years." (petitioners' brief p 5).

> "Petitioners sought Leave to Appeal to the Supreme Court of the State of Michigan. Their application

. . . was denied by the Supreme Court of the State of Michigan on the 8th day of August, 1961, without opinion (Appendix 31a - 32a) and on re-hearing the denial was affirmed on the 21st day of September, 1961, without opinion (Appendix 32a - 33a). From this denial petitioners seek review by this Court." (petitioners' brief p 6).

V

ARGUMENT

Question 1

DO PETITIONERS HAVE A CONSTITUTIONAL RIGHT TO COUNSEL DURING A PRELIMINARY INTERROGATION?

This Court has recognized the right of each State to adopt and follow its own criminal procedure but that procedure must conform to the due process requirement of the Fourteenth Amendment. *Buchalter* v. *New York*, 319 US 427. All that due process demands is that an accused be given a fair hearing. To facilitate due process the Michigan Constitution provides an accused with the right to counsel during trial;[1] however, as the court held in *People* v. *Padolski*, 322 Mich 508, certiorari denied 344 US 845, no such right is accorded during a preliminary examination. If counsel during a preliminary examination is not mandatory, then it follows that counsel during preliminary interrogation is not mandatory, since the preliminary interrogation precedes the preliminary examination.

In *Crooker* v. *California*, 357 US 433, this Court rejected

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[1] Art II, § 19, Michigan Constitution of 1908

defendants' contention that his constitutional right had been violated by the State's refusal to allow him to contact counsel during preliminary interrogation. This Court said:

> " . . . [petitioner] . . . would have every state denial of a request to contact counsel be an infringment of the constitutional right *without regard to the circumstances of the case*. In the absence of any confession, plea or waiver — or other event prejudicial to the accused — such a doctrine would create a complete anomally, since nothing would remain that could be corrected on new trial. Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning — *fair as well as unfair* — until the accused was afforded opportunity to call his attorney. Due process, a concept 'less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' *Betts* v. *Brady*, 316 U.S. 455, 462 (1942), demands no such rule."

Petitioners have failed to show how they were prejudiced by lack of counsel during the preliminary interrogation.

Question 2

WERE PETITIONERS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT BY THE TRIAL JUDGE'S REFUSAL TO GRANT A CONTINUANCE?

Petitioners contend they were not represented by counsel on the preliminary examination. In *People* v. *Podolski*, 332 Mich 508, 518, certiorari denied, 344 US 845, the court said " . . . representation on preliminary examination is permissible, not mandatory." The *Podolski Case* is cited with approval in *Armstrong* v. *Bannan, Warden*, 272 F2d 577, 581, wherein the court stated:

> "This . . . , does not show that he was prejudiced in any way by not being represented by counsel between the time of his arrest and his trial."

The *Armstrong Case, supra* is to be distinguished from the present case, in that, petitioners were represented by counsel but counsel failed to appear at the preliminary examination.

In *Issacs* v. *U.S.*, 159 US 487, 489, this court said:

> " . . . The action of the trial court upon an application for a continuance is purely a matter of discretion and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question."

Cited therein were the following cases:

Wood v. *Young*, 4 Cranch 237;

Barrow v. *Hill*, 13 How. 54;

Crampton v. *United States*, 138 US 361;

Cox v. *Hart*, 145 US 376;

Earnshaw v. *United States*, 146 US 60, 68;

Means v. *Bank of Randall*, 146 US 620.

Later in *Avery* v. *Alabama*, 308 US 444, 446, this court stated:

> "In the course of . . . [a preliminary examination] . . . many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

It is clear that the trial judge acted within his discretion in refusing to grant another continuance when he stated in his opinion; [23A]

> "Even if a right to be represented by counsel at preliminary examination did exist, it does not mean the judicial process stops because the counsel hired failed or refused to appear. Courts still set hearing and trial dates, not defense counsel. Furthermore, the right to counsel does not mean the right to any particular lawyer, especially where the lawyer is too busy to handle his clients' affairs or to appear in court at the date he was requested or agreed to."

Question 3

WERE PETITIONERS DENIED A FAIR TRIAL BY THE ADMISSION INTO EVIDENCE OF STATEMENTS MADE DURING A PRELIMINARY INTERROGATION?

In order to place themselves within the protection of due process, petitioners allege they were denied a fair trial. Yet, petitioners have neglected to furnish this court with any evidence to support this bare allegation. "It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Buchalter* v. *New York*, supra, 431 Innuendo is not the "demonstrable reality" required by this Court.

The rule relating to admissibility of evidence in conspiracy cases is stated in *People* v. *Pickett*, 339 Mich 294, 312 certiorari denied, 349 US 937:

> "In conspiracy cases it is quite impossible to formulate a precise rule of evidence as to what testimony is and what is not admissible as being competent and relevant. Within reasonable bounds, the ruling of this character are within the discretion of the trial court and in the absence of a showing of prejudicial error such rulings do not afford a ground of reversal."

See also, *People* v. *Cooper*, 326 Mich 514, 524; *People* v. *Fleish*, 321 Mich 443, 459.

Acting within the judicial pronouncements of the Michigan Supreme Court, the trial judge admitted petitioners'

statements (3a) (4a) as evidence. He instructed the jury as to their voluntariness (24a).

Even if the statements were inadmissible "• • • it was error of the court," *Buchalter* v. *New York*, 319 US 427, 431, and not within the protection afforded by due process. "The due process clause of the Fourteenth Amendment; • • • does not permit (parties) to bring to the test of a decision in this court every ruling made in the course of a trial in a state court." *Buchalter* v. *New York*, supra, 429, 430.

Question 4

WERE PETITIONERS INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION?

Petitioners, in their application for leave to appeal to the Michigan Supreme Court, raised the point that count two of the information did not inform them of the nature and cause of the accusation. The Michigan Supreme Court denied their application. [31A].

In an early Michigan case, *People* v. *Butler*, 111 Mich 483, 484, the Michigan Supreme Court was confronted with some questions almost identical to those presented by petitioners herein:

> "It is the claim of the . . . [petitioners] . . . that this information should have been quashed, — First, because it states no offense known to the law; second, because it contains no allegations of the means by which . . . [petitioners] . . . conspired to cheat and defraud. The claim of the . . . [petitioners] . . . cannot be sustained."

Petitioners were charged with an offense well known to the law. Conspiracy to do an unlawful act was an indictable offense at the common law, *People* v. *Watson* 75 Mich 582, 586.

To purchase real property in accordance with the applicable law of the realm is a legal act. However, it is illegal to conspire, to cheat and defraud a property owner. See, *People* v. *Arnold*, 46 Michigan 268.

Petitioners, in an apparent attempt to confuse the court contend that to conspire to obtain real property by false pretenses is not in and of itself an unlawful object. Clearly, this is erroneous since the "conspiracy is the gist of the crime", *People* v. *Watson*, supra, 586.

In *People* v. *Arnold*, supra, the Michigan Supreme Court said:

> "It is conceded that if the act which the conspirators combine to perform is unlawful, it is not necessary to set out in the information the means intended to be employed in accomplishing it." (citations omitted).

The Court also stated:

> "To cheat and defraud by false pretenses a person named is an indictable offense by statute. In an information for this offense it would be necessary to specify the pretenses used; but in an information for conspiracy to cheat and defraud by false pretenses the like particularity is not essential. It is enough to allege in general terms the combination and agreement to commit the crime". (citation omitted).

The trial judge in his charge to the jury followed the above statements of the law. [B-1]

States are free to adopt and follow their own criminal procedure, *Buchalter* v. *New York* 319 US 427, 430. This Court has stated that it will not pass upon the sufficiency of an indictment when this question has been decided by a state supreme court, *Caldwell* v. *Texas*, 137 US 816. And, although, the question in that case involved an indictment, it is clear that no distinction between an indictment and information exists which would violate an accused's right to be informed of the crime with which he is charged.

VI

CONCLUSION

We therefore respectfully submit that since no federal question of substance is presented, the petition for certiorari should be denied.

Respectfully submitted,

PAUL L. ADAMS,
Attorney General

Joseph B. Bilitzke
Solicitor General

Robert Weinbaum
Assistant Attorney General

George Mason
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APPENDIX B

I

EXCERPT OF INSTRUCTIONS OF THE COURT

". . . .

The offense charged here is a common-law offense. By that we mean that it exists in law but is not defined or set forth in the statutes. To constitute a conspiracy there must exist an understanding or agreement by two or more persons to accomplish some criminal or unlawful purpose, or to accomplish some lawful purpose, not in itself criminal, by criminal or unlawful means. This is probably a good time for the Court to instruct you as a matter of law there is nothing illegal or unlawful about purchasing equities in real property as such. It is possible, however, to purchase equities or anything else by unlawful methods or means . . ."

As I said, the gist of the offense is the unlawful combination or agreement. In this case it is claimed by the prosecution that the two defendants combined and conspired together to commit the offense of obtaining the Lavrack property by the use of false pretenses. They are not charged with the actual commission of the offense, only with the conspiracy to commit it, and it is not necessary for the prosecution to show that the object of the conspiracy was actually accomplished. The prosecution is only required to establish beyond a reasonable doubt that the defendants combined and conspired together to commit the offense. It is not necessary to establish that the parties ever met together and entered into any formal agreement to commit the offense or that they expressly agreed in words

or in writing that they should do so. It is sufficient if you find that the defendants had an understanding or agreement, express or implied, or a mutual understanding to commit the offense, even though the exact details of the scheme were not fully agreed upon.

Persons planning to commit a criminal offense seldom confide their plans to others, and it is for this reason that proof of conspiracy generally consists of circumstantial evidence. It is not necessary, in order to warrant a conviction of the defendants, that the people establish that they met and arrived at a definite understanding as to how their unlawful plans were to be carried out. It is sufficient if the prosecution establishes to your satisfaction, that an understanding or agreement existed between the defendants, in relation to a common design to commit the offense as charged, and this fact may be deduced by you from all of the testimony in the case. This common design may be regarded as established, if you find the defendants were actually pursuing, in concert, the common design and purpose, under an understanding or agreement, express or implied that I mentioned heretofore.

I should further charge you as a matter of law it is not necessary to constitute the offense of conspiracy that any party be actually deceived or defrauded. The words "deceitfully, fraudulently, cheat and defraud" appear in the information, and perhaps the Court should say a word about them. They are generic terms that defy specific definition. They embrace most of the multifarious means human ingenuity can devise and which are resorted to by one individual to get advantage over another by false pretenses, and they include surprise, trick, cunning and other artifice. A false pretense may be defined as a representation of some present or existing fact or circumstance, including a past fact or circumstance, intended and calculated to mis-

lead, which is not true, and which is intended to induce some action.

"....

Now, there has been in this case evidence submitted of other similar acts of these respondents. You may not consider this evidence with respect to the offense charged here, to-wit, the conspiracy to cheat and defraud the Lavracks; they have no bearing on this particular charge. You may consider such evidence, however, of other similar acts only if it helps or may help or fail to help you in determining the truth or untruth of such matters as mistake, or the absence of mistake by the respondents, the existence of or the absence of plan, scheme or system in doing any material act, and in determining knowledge or lack of knowledge of either of the respondents where such matter is at issue, and in determining whether any material act alleged was intentional or accidental.

"....

APPENDIX B

II

RESPONDENTS CLOSING ARGUMENT TO THE JURY

MR. LEONARD: If the Court please, fortunately I have an opportunity to comment on Mr. Rubin's remarks. I have never heard so many misquotations of law and fact as Mr. Rubin placed before you. As far as the fact is concerned, you heard the evidence. I'm not too worried about that.

Mr. Rubin says that the Judge is going to tell you that

this was no crime of obtaining money under false pretenses, that these people were not cheated. That is not true. He will tell you to direct a verdict of not guilty on the first count because the People were unable to prove beyond the reasonable doubt that the defendants were guilty of the crime charged, not that they weren't cheated, just that we were unable to prove it, and he will tell you this by telling you to direct a verdict of not guilty. He is not going to tell you they were not cheated.

You know what is some what interesting to me to note that Mr. Rubin argued for about 50, 55 minutes, and 50 of those minutes he referred to the first count which he knew was not going to be considered in your deliberations, and about five minutes he talked about the conspiracy. What does this indicate? It indicates sympathy, confuse, delay, confuse, delay. This is his method of trying this case.

Let's put the shoe on the other foot. The Judge will ask you to direct a verdict of not guilty on the first count, but you'll see, and as you will probably know now, he is not going to ask you to direct a verdict on the second count. You are going to decide that count. So, why doesn't he talk about the count? Because he has nothing, nothing to rebut the evidence that was presented in this case along that count.

I might say that buying equities — and I agree wholeheartedly — is not unlawful. It is not a criminal act. Many people buy equities. There is nothing wrong with that; this is legitimate.

What is not legitimate is in obtaining these equities, obtaining this property, you make false statements in order to get them. This is what these defendants did. The proof indicates that, that there were false misrepresentations

made. We don't have to prove it. All we have to do is prove that they agreed to it. As I say, it doesn't have to be a formal writing of an agreement. All it has to be is an agreement, an agreement, meeting of the minds, and acquiescence, which was obvious in this case. These men did it to about ten people who took this stand — many of them before the Lavracks — therefore an agreement had been arrived at on how they were going to do it. Where that agreement occurred it is not certain, but there was an agreement. The facts indicate that. The testimony of the witnesses indicate that.

He talks about venue — another thing he throws in there. I won't talk to you about venue, maybe this will just confuse them a little. I'll just throw it out there. Let me say to Mr. Rubin that all ten of these people are from Genesee County and it is our contention that the agreement was made in Genesee County. That's what we have shown.

Now, he says, "Who was cheated?" Ladies and gentlemen of the jury, he says these two men were cheated. How naive does he think we are? They might be sharp, he says they might be sharp. I contend they are sharpies.

He refers to them as Robin Hood, giving his money away with his Friar Tuck, giving their money away. Can you really believe that? He misquotes the law on foreclosure; they have 18 months, it's a sure thing, it's a sure thing — it's a sure thing with these men. He is going to tell us how these people robbed Silverman and DeGillio, how the Lavracks got more than what they had in the house. I don't know whether he thought you people were asleep or not, but if you recall the testimony, they put a $100 down, they put $650 down, $700 into the house, they had made payments, they were up to date. They went out and

borrowed money to bring it up to date. Surely, surely after they were out of the house they would never go out and borrow money from a finance company for their last payment to bring it up to date if they knew what they were going to do, and that was to subject them to the, an $1,800 deficiency. The Federal Government is asking them to pay $1,800 *now* and Mr. Rubin says they came out better. Now, we know that isn't true, that's a false thing to say.

Now, Mr. Rubin in his opening statement says, "I'm going to prove that Mr. DeGillio was a member of the Teamsters Union." Then he says in closing, after we completely destroyed his evidence along those lines, "Don't think about that, it isn't important." What does it mean? What did we show with regard to the Teamsters? He was not a member. He was not a steward in the Teamsters Union making $176 a week at the time he made these representations to the Lavracks, at the time he made them to anyone of these people, has was not, and we proved that. I don't know what they think we have got here in Genesee County, a bunch of naive people, but these people go down and join the union and after the warrant is made he joins the union, he joins it in February, and the warrant is in January charging that, and he runs down there and joins as a steward, and you notice the official saying, "He made $169 or $170 a week." Did he think we wouldn't find that out? Surely he can't believe we are that naive — apparently he does. What does that indicate? It indicates he is covering. He is trying to cover. He says this house has no value. This house has value, it's worth $13,200.

He says these people didn't own this house. I submit — you saw the deed with their names on that title — they were the legal owners. They were legally responsible as that $1,800 liability indicates; not Mr. DeGillio or Mr. Silverman who made the money by renting the house,

no, the people that own the house, those are the people who are subject to the liability.

And of course, he always throws these insinuations in trying to imply something is there, "I'm going to say," or, "have something to do with Mr. Evans after this trial was over," like he has a right to do that. He has no right to do that. *He is just talking for your benefit.*

And he says, "Who got stuck?" Did DeGillio and Silverman really get stuck? He says, "If the Lavracks can't pay that $1,800, who is paying for it? The United States Government," the Uncle Sam he refers to, the taxpayers, while their two friends here enrich themselves, pad their pockets.

There was no comment by Mr. Rubin in regard to Mr. DeGillio's testimony of calling all these people a liar, not one bit of comment on that, not one comment by Mr. Rubin that Mr. Degillio was telling the truth and that all of these other people were lying. Now, he is brighter than that. He realizes that we are not that naive.

But what he says is, "You know how pat these stories were, everyone of them said the same thing," the implication being that maybe somebody told them that and that all ten of these people took the stand and committed perjury. Do you believe that? Or do you believe that maybe they are telling the truth and that they are telling the truth, that this did happen, because it was a plan. It was a scheme. It was a conspiracy. These people were telling the truth.

Then he says, "Isn't this the picture of an honest man," after Mr. Evans, the attorney says, "You ought to give back that deed," and these boys — these nice sharp business

men — march right down and give Mr. Evans back the deed not to the mortgage company like Mr. Rubin says, they gave it back to McCreedy, who was the original owner. Is this what a man who has done nothing wrong would do if he owns this property legally? No.

These guys didn't want any trouble. They had a good thing going for them.

He says Mr. Evans represents a mortgage company. He represents the Federal National Mortgage Association. It's a federal agency, and he says Mr. DeGillio was never — "here is a man with a clean record," therefore that makes him not guilty. That's immaterial. Mr. Dillinger — I think you had probably heard of him — Mr. Capone, the first time you heard of them I think they had a clean record. I think that's a fallacious argument.

Maybe he hasn't been caught before, maybe this is the first time he has done anything like that. But that should not relieve him of any responsibility.

And he says, "Why didn't the Lavracks go to Mr. Silverman and get their property back?" First, they don't even know where Mr. Silverman is and second — or, Mr. DeGillio. Second, that's easy to say now, real easy to say now, as though they would have gotten it back.

Our testimony indicated right from Mr. DeGillio's lips himself, he has about five or six different addresses. What for? So they can't keep track of him.

I disagree that every business man is sharp. I'd want to give them the benefit of the doubt. These boys had the benefit of a doubt too long. They have been doing this for three years by their own admission.

Mr. DeGillio says, "We maybe have about a hundred homes." What do they rent those homes for? $75? They are brand new homes. Now, remember "75", 100 dollars per month, they have 18 months. 18 months to collect that money and make $1,400. $1,800 while they have possession of this property. What did they pay, $100 to $500 for an equity. What's their property in a situation like that? From a $1,000 to $1,700 a home. Who got cheated? Who was cheated and what happens? They come out with between a $1,000 and $1,700 profit and the people who own the home, their credit is ruined. They are subject to deficiencies by the Federal Government. They may not be able to buy another home on F H A or G I. What do these witnesses say? "If we knew these things were happening, I sure wouldn't have sold it to them. Why, why should they want to subject themselves to civil liability later on? It's obvious.

Another thing, these people, one of them said, "I could have lived in that house myself for 18 months. I'm entitled to do that, the law says I'm entitled to do that rent free." They got money to go out and buy another house, from these defendants, $200 down and then they end up with a $2,000 deficiency; that's a good deal — for them.

They also — and DeGillio and Silverman were aware of this, could have deeded back if they wanted to get out from under the house, they could have deeded it back to FANNIE MAE and avoided any deficiency because these boys wouldn't have told them that, because they knew that that's what these people wanted to avoid, the deficiency, of losing their credit. And if they told them that they could deed back to FANNIE MAE and be relieved of all liability the people would have done it. That's what they wanted to avoid. What's $100 when there is a $2,000 or $3,000 deficiency looking you in the face? They wanted to get out

and that's the way they could have gotten out. But they wouldn't tell them that because they wouldn't have that money in their pockets.

Rubin, Mr. Rubin apparently criticizes the type of life or the type of situation these kids find themselves, young people starting out with married life, an opportunity to buy a home, small down payment, they are working, $75, $85 a week, they are making three or four kids, someone, some sick. These people, these people are entitled to live in a home that they own. They are entitled to a better thing than being cheated out of their home and being left to pay an enormous deficiency, enormous to these people. How do these people raise a $1,000, $2,000 or $3,000? How do they raise that? They don't.

In the opening statement Mr. Rubin says that his clients are working people. We submit they are cheats. They are scavengers, they are parasites. Who do they go after? The people that least, can least afford it, people just starting out. The creed of a cheat is to lie, to defraud, misrepresent. Do they do these things? Look at the testimony. We submit they do.

The evidence is unequivocal on those lines. It shows absolutely that they lied, they defrauded, they misrepresented; they are cheats.

What are some of the things that indicate fraud with these men, real quickly? First I mentioned he joins the Teamsters in February trying to cover on the information or complaint and warrant. He has got five or six different addresses. He puts the deed in his name alone. Mr. Silverman collects the rent. Why do they do that? They misrepresent when the people are signing the papers and tell these people that "You are relieved of all further

responsibility under the mortgage when you sign these papers;" that's the misrepresentation. We don't claim that by them saying "We'll make the payments in the future," that that's a misrepresentation we rely on; it's the fact that when they came in and told these people, "These papers relieve you of all responsibility under the mortgage," that was false. They knew it was false. These people relied on that.

Then there was talk about this assumption of risk paper. You know who always ends up with that? DeGillio and Silverman took it, "We'll send it in." It was never sent in. No testimony that any of that was ever sent in because it wasn't. They never intended to send it in. This is an indication that they meant to misrepresent, make the people think they were assuming the mortgage. These people don't know what that means. They don't realize that you have to get another mortgage and pay off yours before you are released of all liability, and this other mortgage should run to DeGillio, that's the only way they could be released of liability.

His own testimony on the stand indicates what kind of a person he is. You remember when Joan Curtis testified? She says, "I called him a crook."

"What was his reaction?" I ask.

"He laughed." These guys arrogant crooks. They think it's great to be a crook, to cheat people.

MR. RUBIN: Your Honor, I don't like to interrupt but I don't think that's proper rebuttal.

THE COURT: No, I think it's —

MR. RUBIN: I ask that that be stricken as inflamma-

tory, prejudicial. The jury should be instructed to disregard it.

THE COURT: All right, I'll instruct them to strike it from their minds.

MR. LEONARD: I apologize. I didn't realize I was restricted that much, I'm sorry, your Honor.

All we ask in this case is that you consider this fact that there was an agreement to commit a conspiracy. Whether that conspiracy was carried out or not is not really the important thing. We showed the witnesses, we showed by witnesses' testimony that there must be an agreement. There had to be an agreement because all ten of them say, "They told us, they told us that these papers would relieve us of all responsibility under the mortgage." This is what I'm saying, this is the crime, the fact that they had agreed, the fact that they had agreed to defraud these people, to cheat and defraud these people.

The witnesses indicated that it was more than coincidence, it was a plan. You can see to it, ladies and gentlemen of the jury, that these people, these innocent people get what they deserve, what they are entitled to, by seeing to it that they get what they deserve, and that's a verdict of guilty of conspiracy to cheat and defraud.

Let your verdict stand for the proposition that we, the uncheated at this time, anyway, will not allow the people who are susceptible to being cheated be taken. People can come into our community and do something like that.

Ladies and gentlemen of the jury, I don't want to take anymore of your time. I think that you are aware of the facts and the Court will instruct you on the law.

Consider carefully what we have said. We don't say buying equities is illegal. We say agreements with, as to two defendants made to buy equities by misrepresentation is unlawful, is a criminal offense, is conspiracy to cheat and defraud.

I hereby certify that the above is a true and correct transcript of the testimony and proceedings in the above entitled cause and the whole thereof on the above date.

Walter E. Gane—Court Reporter
7th Judicial District
Genesee County Courthouse
Flint, Michigan

I hereby certify that the above is a true record of the proceedings had in the above cause.

Donn D. Parker.
Circuit Court Judge